Ronald Beadle v Hamzah HM Saman & Ors

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO W–01–56 OF 2001
RICHARD MALANJUM, HASHIM YUSOFF FCJJ AND ABDUL WAHAB PATAIL J
10 DECEMBER 2006

Civil Procedure — Striking out — Action — Whether claim was plain and obvious case suitable to be struck out — Rules of the High Court 1980 O 18 r 19

Limitation — Public Authorities Protection Act — Whether action time barred — Recovery of income tax — Continuous act — Whether issue of certificate to prevent appellant from leaving Malaysia and seizure of appellant's passport constituted a continuous act or a single act — Public Authorities Protection Act 1948 s 2(a) — Income Tax Act 1967 s 104

Revenue Law — Income tax — Recovery by government of taxes due and payable — Whether issue of certificate to prevent appellant from leaving Malaysia and seizure of appellant's passport were unlawful — Whether ouster clause applied — Whether ouster clause excluded the jurisdiction of the court — Income Tax Act 1967 s 104(5)

The appellant, a British citizen, was employed as a Director of Operations by the SEA Helicopters (M) Sdn Bhd ('SEAH'). Upon the appellant's resignation in SEAH on or about 31 December 1980, the second respondent directed SEAH to remit RM22,778.70 being the deduction made from the appellant's monthly salary towards payment of his income tax. However, SEAH failed to make such remittance to the second respondent. As a result the third respondent commenced legal proceeding against SEAH for the recovery of the outstanding income tax. Meanwhile, on 17 December 1981, the first respondent in his capacity as the Assistant Director of Inland Revenue acting under s 104 of the Income Tax Act 1967 ('ITA') issued a certificate ('certificate') to the Inspector General of Police and the Director General of Immigration to prevent the appellant from leaving Malaysia until the appellant's income tax was settled. In accordance with the certificate, the police seized the appellant's international passport. Despite numerous requests and appeals to the respondents, the respondents failed to withdraw or release the passport to the appellant. In 1984 SEAH was wound up. The third respondent then commenced an action against the appellant to claim for the outstanding income tax. The claim of the third respondent against the appellant was dismissed by the High Court on 17 February 1998. In turn the passport of the appellant was returned to him on 21 April 1998 after a lapse of 16 years. The appellant commenced this suit under appeal against the respondents claiming damages for the alleged wrongful act done or neglect or default committed by the first respondent as a public officer acting as an

agent of and under the instructions of the second and third respondents. On the application of the respondents, the High Court ordered the writ of summons and the statement of claim of the appellant to be struck out. Dissatisfied with the decision of the High Court the appellant thus appealed to this court.

There were four issues before the Court of Appeal: (1) regarding the application of the second limb of s 2(a) of the Public Authorities Protection Act 1948 ('PAPA'), whether the respective acts by the first respondent in issuing the certificate and the refusal to withdraw the same and by the third respondent in seizing the passport of the appellant and in refusing to release it, constituted a continuous act or a single act; (2) whether the acts of the first respondent in issuing the certificate and that of the third respondent in seizing the passport respectively were unlawful thereby excluding them from the protection of s 104(5) of the ITA; (3) whether the ouster clause in s 104(5) ITA excluded the jurisdiction of the court; and (4) whether the claim was a plain and obvious case suitable to be struck out under O 18 r 19 of the Rules of the High Court 1980. The appellant contended that the right to sue only arose from the date of release of the passport and that since the present action was instituted on 31 May 2000 it was well within the 36 months limitation as provided under the PAPA.

Held, allowing the appeal with costs to be taxed:

(1) Section 104 (5) of ITA cannot be described as an ouster clause. It does not prohibit anyone from filing a claim. All it does is to provide a defence to such a claim (see para 14).

(2) Each respondent did different actions which culminated in the seizure and retention of the passport of the appellant for a period of not less than 16 years. The act of issuing the certificate and the subsequent seizure of the passport should be construed as one act for the purposes and enforcement of s 2(a) of PAPA. The failure by the Director General of Income Tax to formally withdraw the certificate or at least inform the relevant parties to ignore it, allowed for the continuance of an act which continued to cause damage to the appellant. During the period when the passport of the appellant was retained by the respondents the damage to the appellant continued. Hence, his cause of action only began to run from the time his passport was released, ie from 24 April 1998. Since he filed his claim on 21 May 2000 he was therefore well within the 36 months period as prescribed in the second limb of s 2(a) of PAPA (see paras 21–22).

(3) There were several triable issues which require the full hearing of the claim. The power to summarily dismiss a claim or defence should only be exercised in a plain and obvious case. Accordingly to summarily conclude that the acts of issuing the certificate by the Director General of Income Tax, the seizure of the passport by the Police, the failure to formally withdraw the certificate and the release of the passport to the appellant were one and single act and lawful without the benefit of hearing oral evidence from the relevant witnesses and detailed arguments and mature consideration on the relevant laws, would tantamount to a denial of a fair trial to the appellant (see para 24).

[Bahasa Malaysia summary

Perayu seorang warganegara British yang telah diambil bertugas sebagai seorang Pengarah Operasi oleh SEA Helicopters (M) Sdn Bhd ('SEAH'). Apabila perayu meletakkan jawatannya di dalam SEAH pada atau sekitar 31 Disember 1980, responden kedua mengarahkan SEAH untuk membayar RM22,778.70 sebagai potongan yang telah dibuat daripada gaji bulanan perayu bagi bayaran cukai pendapatannya. Walau bagaimanapun, SEAH telah gagal untuk membuat bayaran tersebut kepada responden kedua. Ini menyebabkan responden ketiga memulakan tindakan undang-undang terhadap SEAH untuk mendapatkan kembali cukai pendapatan yang tertunggak. Sementara itu, pada 17 Disember 1981, responden pertama berdasarkan kapasitinya sebagai Penolong Pengarah, Jabatan Hasil Dalam Negeri bertindak di bawah s 104 Akta Cukai Pendapatan 1967 ('ACP') mengeluarkan satu perakuan ('perakuan') kepada Ketua Polis Negara dan Ketua Pengarah Imigresen untuk menghalang perayu daripada meninggalkan Malaysia melainkan cukai pendapatan perayu telah diselesaikan. Selaras dengan perakuan tersebut polis telah merampas pasport antarabangsa perayu. Walaupun beberapa kali meminta dan merayu kepada responden-responden, responden-responden telah gagal untuk menarik balik atau melepaskan pasport kepada perayu. Pada 1984, SEAH telah digulungkan. Responden ketiga kemudiannya memulakan tindakan terhadap perayu untuk cukai pendapatan yang tertunggak. Tuntutan responden ketiga terhadap perayu telah ditolak oleh Mahkamah Tinggi pada 17 Februari 1998. Sebagai balasan pasport perayu telah dikembalikan kepadanya pada 21 April 1998 selepas berlalunya 16 tahun. Perayu memulakan tindakan ini yang dalam rayuan terhadap responden-responden menuntut ganti rugi untuk dakwaan tindakan salah yang telah dilakukan atau kecuaian atau kemungkiran yang telah dilakukan oleh responden pertama sebagai seorang penjawat awam yang bertindak sebagai ejen dan di bawah arahan responden kedua dan ketiga. Semasa permohonan responden-responden, Mahkamah Tinggi telah memerintahkan writ saman dan pernyataan tuntutan perayu dibatalkan. Tidak puas hati dengan keputusan Mahkamah Tinggi perayu kemudiannya merayu kepada mahkamah ini.

Terdapatnya empat isu di hadapan Mahkamah Rayuan: (1) berkenaan dengan permohonan bahagian kedua s 2(a) Akta Perlindungan Pihak Berkuasa Awam 1948 ('APPBA'), sama ada setiap tindakan oleh responden dalam mengeluarkan perakuan dan keengganan untuk menarik balik perkara yang sama dan oleh responden ketiga dalam merampas pasport perayu dan dalam keengganan untuk melepaskannya, menjadikan satu tindakan berterusan atau tindakan tunggal; (2) sama ada tindakan-tindakan responden pertama dalam mengeluarkan perakuan dan berkenaan responden ketiga dalam merampas pasport masing-masing adalah menyalahi undang-undang dan dengan itu mengecualikan mereka daripada perlindungan s 104(5) ACP; (3) sama ada klausa penyingkiran di dalam s 104(5) ACP tidak termasuk bidang kuasa mahkamah; dan (4) sama ada tuntutan adalah kes yang jelas dan terang sesuai untuk dibatalkan di bawah A 18 k 19 Kaedah-Kaedah Mahkamah Tinggi 1980. Perayu menegaskan bahawa hak untuk membuat dakwaan hanya timbul daripada tarikh pelepasan pasport dan semenjak tindakan sekarang telah dimulakan pada 31 Mei 2000 ianya betul-betul di dalam 36 bulan had masa yang diperuntukkan di bawah APPBA.

Diputuskan, membenarkan rayuan dengan kos untuk ditaksirkan:

(1) Seksyen 104(5) ACP tidak boleh disifatkan sebagai satu klausa penyingkiran. Ianya tidak melarang sesiapa daripada memfailkan tuntutan. Kesemuanya adalah untuk menyediakan satu pembelaan kepada tuntutan tersebut (lihat perenggan 14).

(2) Setiap responden telah melakukan tindakan yang berbeza yang berkesudahan dengan rampasan dan penahanan pasport perayu untuk tempoh tidak kurang 16 tahun. Tindakan mengeluarkan perakuan dan selanjutnya rampasan pasport seharusnya ditafsirkan sebagai satu tindakan untuk tujuan dan penguatkuasaan s 2(a) APPBA. Kegagalan Ketua Pengarah Cukai Pendapatan untuk menarik balik secara formal perakuan atau sekurang-kurangnya memberitahu pihak yang berkaitan untuk mengabaikannya membenarkan lanjutan tindakan yang mana berterusan menyebabkan kerosakan terhadap perayu. Semasa tempoh pasport perayu di tahan oleh responden-responden, kerosakan terhadap perayu adalah berterusan. Oleh yang demikian, kausa tindakannya hanya bermula daripada masa pasportnya dilepaskan iaitu daripada 24 April 1998. Oleh kerana beliau memfailkan tuntutannya pada 21 Mei 2000 beliau sebenarnya masih dalam tempoh 36 bulan seperti mana yang diperuntukkan di dalam bahagian kedua s 2(a) APPBA (lihat peranggan 21–22).

(3) Terdapatnya beberapa isu yang perlu dibicarakan yang memerlukan pendengaran penuh tuntutan tersebut. Kuasa untuk pembatalan terus satu tuntutan atau pembelaan hanya dilakukan di dalam kes yang jelas dan terang. Sewajarnya untuk menyimpulkan terus bahawa tindakan-tindakan berkenaan dengan pengeluaran perakuan oleh Ketua Pengarah Cukai Pendapatan, perampasan pasport oleh polis, kegagalan untuk menarik balik secara formal perakuan dan pelepasan pasport kepada perayu adalah satu dan tindakan tunggal dan mengikut undang-undang tanpa manfaat pendengaran keterangan lisan daripada saksi-saksi berkaitan dan dakwaan lengkap dan pertimbangan yang matang ke atas undang-undang yang berkaitan adalah sama seperti penafian kepada perbicaraan yang adil kepada perayu (lihat perenggan 24).]

Notes

For a case on income tax, recovery by government of taxes due and payable, see 10 *Mallal's Digest* (4th Ed, 2002 Reissue) para 2289.

For cases on Public Authorities Protection Act, whether action time barred, see 9 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 2317–2320.

For cases on striking out action, see 2(2) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 2526–2557.

Cases referred to

Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd [1993] 3 MLJ 36 (refd)

Bank Bumiputra Malaysia Bhd v Majlis Amanah Ra'ayat [1979] 1 MLJ 23 (refd)

Carey v Bermondsey Borough Council [1906] 94 LT 216 (refd)

Credit Corporation (M) Bhd v Fong Tak Sin [1991] 1 MLJ 409 (refd)

Ibrahim bin Mohideen Kutty v Timbalan Menteri Dalam Negeri & Ors [2003] 5 MLJ 294 (refd)
Lee Nyan Choi v Voon Noon [1979] 2 MLJ 28 (refd)
Mak Koon Yong & Anor v Municipal Councillors, Malacca [1967] 1 MLJ 256 (refd)
Markey v Tolworth Joint Isolation Hospital District Board [1900] QBD 454 (refd)
Sr Katherine Lim KH v Ketua Pengarah Perkhidmatan Perubatan Malaysia & Ors [1997] 2 MLJ 538 (refd)

Legislation referred to

Income Tax Act 1967 s 104(1), (2), (4), (5)
Public Authorities Protection Act 1948 ss 1, 2(a)
Public Authorities Protection Act 1893 [UK] s 1
Rules of the High Court 1980 O 18 r 19

Appeal from: Civil Suit No S6–21–64 of 2000 (High Court, Kuala Lumpur)

Kan Wong Hin (Jeffery Wong with him) (Jeffery Wong, Noorul & Lim) for the appellant.
Kamaruddin Mohd Said (Senior Federal Counsel, Attorney General's Chamber) for the respondents.

Richard Malanjum JCA (now CJ (Sabah and Sarawak), delivering judgment of the court):

INTRODUCTION

[1] On 28 July 2000, the respondents applied by way of summons in chamber to strike out the appellant's writ of summons and statement of claim under O 18 r 19(1)(b) or (d) of the Rules of the High Court 1980. The learned senior assistant registrar ('SAR') dismissed the application with costs. The first and third respondents successfully appealed to the judge in chambers. The writ of summons and the statement of claim of the appellant were therefore ordered to be struck out. Dissatisfied with the decision of the High Court, the appellant thus appealed to this court.

[2] At the outset of the hearing, the learned senior federal counsel ('SFC') appearing for the respondents applied for security for costs on the ground that the appellant did not reside in Malaysia. A sum of Ringgit Malaysia Ten Thousand (RM10,000) was agreed and duly settled between the parties. We then proceeded to hear the appeal. At the conclusion of the hearing, we were unanimous in our decision to allow the appeal with costs. We now give our reasons upon request for the purpose of the hearing proper of the suit.

THE BRIEF FACTS

[3] The appellant, a British citizen at the material time, was employed as a Director of Operations by the SEA Helicopters (M) Sdn Bhd ('SEAH'). Upon the appellant's resignation in SEAH on or about 31 December 1980, the second respondent

directed SEAH to remit RM22,778.70 being the deduction made from the appellant's monthly salaries towards payment of his income tax. However, SEAH failed to make such remittance to the second respondent. As a result the third respondent commenced legal proceeding against SEAH for the recovery of the outstanding income tax.

[4] Meanwhile, on 17 December 1981, the first respondent in his capacity as the Assistant Director of Inland Revenue acting under s 104 of the Income Tax Act 1967 ('ITA') issued a certificate to the Inspector General of Police and the Director General of Immigration to prevent the appellant from leaving Malaysia unless the appellant's income tax was settled or security was furnished to the satisfaction of the Director General of Inland Revenue. In accordance with the certificate, the police seized the appellant's international passport. Despite numerous requests and appeals to the respondents, the respondents failed to withdraw or release the passport to the appellant.

[5] In the meantime, on or about 13 February 1984, third respondent obtained a winding up order against SEAH and in or around March 1984, a Receiving Officer was appointed as the liquidator for SEAH. In turn, the third respondent decided not to pursue further action against SEAH to recover the appellant's outstanding income tax. However, the third respondent commenced an action against the appellant to claim for the outstanding income tax. Before the sessions court, the claim was successful. However, the appellant successfully appealed to the High Court. The claim of the third respondent against the appellant was dismissed on 17 February 1998. In turn the passport of the appellant was returned to him on 21 April 1998 after a lapse of 16 years.

[6] The appellant therefore commenced this suit under appeal against the respondents claiming damages for the alleged wrongful act done or neglect or default committed by the first respondent as a public officer acting as an agent of and under the instructions of the second and third respondents.

BEFORE THE HIGH COURT

[7] The High Court in addressing the claim by the appellant focused on two main issues. Firstly, in relation to the application of the second limb of s 2(a) of the Public Authorities Protection Act 1948 ('PAPA'). The issue was whether the respective acts, that is by the first respondent in issuing the aforementioned certificate and the refusal to withdraw the same and by the third respondent in seizing the passport of the appellant and in refusing to release it, constituted a continuous act or a single act. Secondly, whether the acts of the first respondent in issuing the certificate and that of the third respondent in seizing the passport respectively were unlawful thereby excluding them from the protection of s 104(5) of the ITA.

[8] The learned High Court judge after hearing submissions ruled in favour of the respondents. Briefly, the reasons given are as follows:

(i) the acts of the first respondent and third respondent as described hereinabove were held to be a single act for the purpose of computing the period of 36 months as stipulated under s 2(a) of PAPA. The case of *Sr Katherine Lim KH v Ketua Pengarah Perkhidmatan Perubatan Malaysia & Ors* [1997] 2 MLJ 538 was relied upon as the authority for the finding; and

(ii) that the protection of s 104(5) of the ITA was available to the respondents for the acts done which were lawful since at the material time the appellant did have an outstanding income tax payable. Being a foreigner there was the likelihood that he would leave the country with the tax due unpaid.

BEFORE THE COURT OF APPEAL

[9] Before us, there were four issues raised on behalf of the appellant. The first and second issues were as those canvassed in the High Court. The third issue was on the submission that the ouster clause in s 104(5) of the ITA could never exclude the jurisdiction of the court. The last issue submitted was that the claim was not a plain and obvious case suitable to be struck out under O 18 r 19 of the Rules of the High Court 1980.

CONTENTIONS AND FINDINGS

[10] Learned counsel for the appellant argued that words *'continuance of injury or damage … after the ceasing thereof'* within the second limb of s 2(a) of PAPA mean the continuance of the act which caused the injury or damage and for the purpose of computing the period of limitation, time would begin to run when the act causing the injury or damage ceased. Learned counsel said that the certificate issued by the first respondent was never withdrawn and thus the injury for the purpose of PAPA continued. On the seizure of the passport, he said that it was only released to the appellant on 21 April 1998. Learned counsel submitted that the continuous injury or damage to the appellant was the deprivation of his fundamental liberty brought about by the issuance of the certificate and thereafter the seizure of his passport. According to learned counsel, such acts were continuous acts which only ceased when the High Court in Civil Appeal No R1–12–336 of 1996 decided in favour of the appellant thereby enabling his passport to be released to him on 21 April 1998. It was the contention of learned counsel that the right to sue only arose from the date of release of the passport. Any action must therefore be filed on or before 16 February 2001. It was suggested that the alterative date was on or before 20 April 2001. Since the present action was instituted on 31 May 2000, it was well within the 36 months limitation as provided under the PAPA.

[11] The learned SFC submitted that the learned High Court judge was correct in his conclusion. He admitted that there was no formal letter on the withdrawal of the certificate. However, the law only requires the release of the passport.

[12] In our view the pivotal issue is on the determination of the scope of s 2(a) of PAPA and s 104(1), (2) and (4) of the ITA.

[13] Now, s 104 of ITA reads:

Section 104: Recovery from persons leaving Malaysia

(1) The Director General, where he is of the opinion that any person is about or likely to leave Malaysia without paying

(a) all tax payable by him (whether or not due or due and payable);

(b) all sums payable by him under s 103(3), (4), (5), (6), (7) or (8); and

(c) all debts payable by him under ss 107A(2) or 109(2) or 109B(2),may issue to any Commissioner of Police or Director of Immigration a certificate containing particulars of the tax, sums and debts so payable with a request for that person to be prevented from leaving Malaysia unless and until he pays all the tax, sums and debts so payable or furnishes security to the satisfaction of the Director General for their payment.

(2) Subject to any order issued or made under any written law relating to banishment or immigration, any Commissioner of Police or Director of Immigration who receives a request under subsection (1) in respect of any person shall take or cause to be taken all such measures (including the use of reasonable force and the seizure, removal or retention of any certificate of identity and any passport, exit permit or other travel document relating to that person) as may be necessary to give effect to it.

(3) The Director General shall cause notice of the issue of a certificate under subs (1) to be served personally or by registered post on the person to whom the certificate relates:

Provided that the non-receipt of the notice by that person shall not invalidate anything done under this section.

(4) Where a person in respect of whom a certificate has been issued under subs (1):

(a) produces a written statement signed on or after the date of the certificate by the Director General or an authorized officer to the effect that all the tax, sums and debts specified in the certificate have been paid or that security has been furnished for their payment; or

(b) pays all the tax, sums and debts specified in the certificate to the officer in charge of a police station or to an immigration officer, the statement or the payment, as the case may be, shall be sufficient authority for allowing that person to leave Malaysia.

(5) No legal proceedings shall be instituted or maintained against the Government, a State Government, a police officer or any other public officer in respect of anything lawfully done under this section or s 115(2).

[14] Contrary to the submission of learned counsel for the appellant, we are of the opinion that s 104(5) of the ITA cannot be described as an ouster clause. It does not prohibit anyone from filing a claim. All it does is to provide a defence to such a claim. Section 2(a) of PAPA reads:

Where, after the coming into force of this Act, any suit, action, prosecution or other proceeding is commenced in the Federation against any person for any act done in pursuance or execution or intended execution of any written law or of any public duty or authority or in respect of any alleged neglect or default in the execution of any such written law, duty or authority the following provisions shall have effect:

A (a) the suit, action, prosecution or proceeding shall not lie or be instituted unless it is commenced within thirty-six months next after the act, neglect or default complained of or, in the case of a continuance of injury or damage, within thirty-six months next after the ceasing thereof.

B **[15]** Thus, s 2(a) of PAPA provides that any suit, action, prosecution or other proceeding commenced in the Federation against any person for any act done in pursuance or execution or intended execution of any written law or of any public duty or authority or in respect of any alleged neglect or default in the execution of any such written law, duty or authority shall not lie or instituted unless:

C (a) it is commenced within thirty-six months next after the act, neglect or default complained of; or

(b) in the case of a continuance of injury or damage, within thirty-six months next after the ceasing thereof.

D **[16]** Two sets of situations are therefore envisaged for the limitation periods stipulated therein to arise. The first set deals with where the *'act, neglect or default complained of'* referred to is confined to a single act, neglect or default and does not involve an element of *continuance* thereof and that a single act per se would constitute a complete cause of action (see *Credit Corporation (M) Bhd v Fong Tak Sin* [1991] 1 MLJ 409 (SC)).

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[17] The other set is where the limitation period begins to run when the injury or damage ceases (see *Ibrahim bin Mohideen Kutty v Timbalan Menteri Dalam Negeri & Ors* [2003] 5 MLJ 294).

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[18] This section was also succinctly explained by Wan Sulaiman J (as he then was) in the case of *Mak Koon Yong & Anor v Municipal Councillors, Malacca* [1967] 1 MLJ 256. After referring to the English Court of Appeal case of *Carey v Metropolitan Borough of Bermondsey* 20 TLR, the learned judge said this at p 259:

G Court of Appeal held in respect of that section of the English Act which is in pari materia with our s 2(a) that 'the language of the section was reasonably plain and it was manifest that the continuance of the injury or damage meant the continuance of the act which caused the damage'. Time would therefore begin to run for the purposes of the Ordinance, from the time when the act was caused, not from the time when the injury or damage ceased, or in the case of a continuing injury or damage, when the act causing the injury or damage ceased.

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[19] Indeed in *Carey v Bermondsey Borough Council* [1906] 94 LT 216 the word *'continuance'* found in s 1 of the Public Authorities Protection Act 1893 of the United Kingdom was construed to mean *'a continuing cause of action'* or the continuance of the act which caused the damage (see also *Markey v Tolworth Joint Isolation Hospital* I *District Board* [1900] QBD 454).

[20] The facts of this instant appeal are not on all fours with the case of *Sr Katherine Lim KH v Ketua Pengarah Perkhidmatan Perubatan Malaysia & Ors*. In that case, there was no dispute that the main issue for determination was the date of

dismissal which constituted the act complained of. It was held that the date in the gazette was the date of dismissal. Hence, we agree with the submission of learned counsel for the appellant that the learned High Court judge erred in applying the ratio of that case to this instant appeal without considering their factual disparities.

[21] There are several parties involved in this instant appeal. Each party did different actions which culminated in the seizure and retention of the passport of the appellant for a period of not less than 16 years. The act of issuing the certificate and the subsequent seizure of the passport should be construed as one act for the purposes and enforcement of s 2(a) of PAPA. However, the release of the passport and the failure to take any positive step to revoke the certificate issued or at least to inform the relevant parties that it is no longer effective cannot, by any stretch of imagination, be taken as forming one and same act as the issuance and seizure. It was not shown to us during the hearing of this appeal that the police or the immigration would not enforce the demand of the same certificate against the appellant in the next available opportunity. The dismissal of the claim against the appellant did not include the annulment of the certificate. In any event for the purposes of s 2(a) of PAPA we do not think the dismissal of the claim itself is sufficient. So long as the certificate has not been formally cancelled or annulled it is subject to enforcement by the police and/or the immigration. Hence, in our view the failure by the Director General of Income Tax to formally withdraw the certificate or at least inform the relevant parties to ignore it allows for the continuance of an act which continues to cause damage to the appellant. On this point alone, we are of the unanimous view that the claim of the appellant is not statute barred.

[22] Further, we are also in agreement with learned counsel for the appellant that during the period when the passport of the appellant was retained by the respondents the damage to the appellant continued. Hence, his cause of action only began to run from the time his passport was released, that is, from 24 April 1998. Since he filed his claim on 21 May 2000 he was therefore well within the 36 months period as prescribed in the second limb of s 2(a) of PAPA.

[23] The next issue is whether there are triable issues involved in this case. This relates more to s 104(5) of ITA on the question of whether the act or acts were lawfully done bearing in mind the facts and circumstances of this case and the application of the relevant sections thereto.

[24] Having given our anxious consideration on all the materials and the submissions of parties before us we are of the unanimous view that there are several triable issues which require the full hearing of the claim. The power to summarily dismiss a claim or defence should only be exercised in a plain and obvious case. (See: *Lee Nyan Choi v Voon Noon* [1979] 2 MLJ 28; *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36). In our view, some of the triable issues are as follows:

(a) whether the issuance of the certificate was really necessary and justified in law bearing in mind the apparent undisputed background facts and circumstances. In other words whether the payments by the appellant to his former employer

by way of deductions from his monthly salaries of all the taxes payable by him constituted payments for his income taxes so as to render s 104(1) of ITA inapplicable;

(b) whether s 104 (1) of ITA requires an objective or subjective opinion of the Director General before a decision could be made to issue a certificate thereunder. This is a serious question in law which would require mature consideration and not by way of summary dismissal or simply ignored (see *Bank Bumiputra Malaysia Bhd v Majlis Amanah Ra'ayat* [1979] 1 MLJ 23);

(c) whether s 104 (2) of ITA makes it mandatory upon being served with a certificate issued by the Director General of Income Tax, for the police or immigration to comply with the request, instruction or direction contained therein notwithstanding any prevailing facts and circumstances as in this case; and

(d) whether the conduct of the Director General of Income Tax was reasonable and in consonant with the overall scheme of s 104 of ITA and thus lawful even when he failed to recover from the former employer of the appellant which had already collected all the income taxes payable by the appellant and instead pursued the claim against the appellant.

[25] We hasten to add that the foregoing issues should not be considered exhaustive or even binding upon the trial judge or the parties when this case comes up for full hearing. The trial court and/or the parties should be at liberty either to vary, add, reduce or expand all or any of them in order for the trial court to come to its decision on the dispute between the parties.

[26] Accordingly, to summarily conclude that the acts of issuing the certificate by the Director General of Income Tax, the seizure of the passport by the police, the failure to formally withdraw the certificate and the release of the passport to the appellant were one and single act and lawful without the benefit of hearing oral evidence from the relevant witnesses and detailed arguments and mature consideration on the relevant laws, would tantamount, in our view, to a denial of a fair trial to the appellant.

[27] For the above reasons, we allowed the appeal with costs to be taxed. Deposit to be refunded to the appellant.

Appeal allowed with costs to be taxed.

Reported by Loo Lai Mee